

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**May 29, 2020**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JANIE ELIZABETH G.,

Plaintiff,

v.

ANDREW M. SAUL,  
Commissioner of Social Security,

Defendant.

No. 1:19-CV-03046-RHW

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND REMANDING TO  
THE COMMISSIONER**

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 13, 14. Plaintiff brings this action seeking judicial review of the Commissioner of Social Security's final decision, which denied her application for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. § 401-434, and her application for supplemental security income under Title XVI of the Act, 42 U.S.C. §1381-1383F. *See* Administrative Record (AR) at 1-6, 12-34. After reviewing the administrative record and briefs filed by the parties, the Court

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT AND REMANDING TO THE COMMISSIONER**

1 **GRANTS** Plaintiff's Motion for Summary Judgment and **DENIES** Defendant's  
2 Motion for Summary Judgment.

3 **I. Jurisdiction**

4 Plaintiff filed her applications for disability insurance benefits and  
5 supplemental security income on March 24, 2015. *See* AR 15, 234-42, 243-48. In  
6 both applications, she initially alleged disability beginning on July 25, 2014.<sup>1</sup> AR  
7 236, 243. Plaintiff's applications were initially denied on July 16, 2015, *see* AR 151-  
8 54, and on reconsideration on October 28, 2015. *See* AR 159-181. On November 23,  
9 2015, Plaintiff filed a request for a hearing. AR 182-83.

10 A hearing with an Administrative Law Judge ("ALJ") occurred on October 2,  
11 2017. AR 49-86. On March 19, 2018, the ALJ issued a decision concluding that  
12 Plaintiff was not disabled as defined in the Act and was therefore ineligible for  
13 disability benefits or supplemental security income. AR 12-34. On February 6, 2019,  
14 the Appeals Council denied Plaintiff's request for review, AR 1-6, thus making the  
15 ALJ's ruling the final decision of the Commissioner. *See* 20 C.F.R. §§ 404.981,  
16 416.1481. On March 12, 2019, Plaintiff timely filed the present action challenging  
17 the denial of benefits. ECF No. 1. Accordingly, her claims are properly before this  
18 Court pursuant to 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(c)(3).

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<sup>1</sup> Plaintiff later amended her alleged onset date to coincide with her fiftieth birthday, which was on February 13, 2015. AR 359. However, for claims under Title XVI, benefits are not payable prior to the application's filing date. *See* 20 C.F.R. § 416.335.

## II. Five-Step Sequential Evaluation Process

The Social Security Act defines disability as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be under a disability only if the claimant’s impairments are so severe that the claimant is not only unable to do his or her previous work, but cannot, considering claimant’s age, education, and work experience, engage in any other substantial gainful work that exists in the national economy. 42 U.S.C. § 1382c(a)(3)(B).

The Commissioner has established a five-step sequential evaluation process for determining whether a claimant is disabled within the meaning of the Act. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). Step one inquires whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R. §§ 404.1520(b), 416.920(b). If the claimant is, he or she is not entitled to disability benefits. 20 C.F.R. §§ 404.1571, 416.920(b). If not, the ALJ proceeds to step two.

Step two asks whether the claimant has a severe impairment, or combination of impairments, that significantly limits the claimant’s physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does

1 not have a severe impairment the disability claim is denied and no further evaluative  
2 steps are required. Otherwise, the evaluation proceeds to the third step.

3 Step three involves a determination of whether one of the claimant's severe  
4 impairments "meets or equals" one of the listed impairments acknowledged by the  
5 Commissioner to be sufficiently severe as to preclude substantial gainful activity. 20  
6 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R. § 404 Subpt. P. App. 1 ("the  
7 Listings"). If an impairment does, the claimant is *per se* disabled and qualifies for  
8 benefits. *Id.* If the claimant is not *per se* disabled, the evaluation proceeds to the  
9 fourth step.

10 Step four examines whether the claimant's residual functional capacity  
11 enables the claimant to perform past relevant work. 20 C.F.R. §§ 404.1520(e)-(f),  
12 416.920(e)-(f). If the claimant can still perform past relevant work, the claimant is  
13 not entitled to disability benefits and the inquiry ends. *Id.*

14 Step five shifts the burden to the Commissioner to prove that the claimant is  
15 able to perform other work in the national economy, taking into account the  
16 claimant's age, education, and work experience. *See* 20 C.F.R. §§ 404.1512(f),  
17 404.1520(g), 404.1560(c) & 416.912(f), 416.920(g), 416.960(c).

### 18 III. Standard of Review

19 A district court's review of a final decision of the Commissioner is governed  
20 by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited, and the

1 Commissioner's decision will be disturbed "only if it is not supported by substantial  
2 evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1144, 1158-59 (9th Cir.  
3 2012) (citing § 405(g)). In reviewing a denial of benefits, a court may not substitute  
4 its judgment for that of the ALJ. *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir.  
5 1992). When the ALJ presents a reasonable interpretation that is supported by the  
6 evidence, it is not the court's role to second-guess it. *Rollins v. Massanari*, 261 F.3d  
7 853, 857 (9th Cir. 2001). Even if the evidence in the record is susceptible to more  
8 than one rational interpretation, if inferences reasonably drawn from the record  
9 support the ALJ's decision, then the court must uphold that decision. *Molina v.*  
10 *Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

11 Moreover, courts "may not reverse an ALJ's decision on account of an error  
12 that is harmless." *Id.* An error is harmless "where it is inconsequential to the ultimate  
13 nondisability determination." *Id.* at 1115. In order to find that an ALJ's error is  
14 harmless, a court must be able to "confidently conclude that no reasonable ALJ,  
15 when fully crediting the testimony, could have reached a different disability  
16 determination." *Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015). The burden  
17 of showing that an error is harmful generally falls upon the party appealing the  
18 ALJ's decision. *Molina*, 674 F.3d at 1111.

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#### IV. Statement of Facts

The facts of the case are set forth in detail in the transcript of proceedings and only briefly summarized here. Plaintiff was 50 years old on the amended alleged date of onset, which the regulations define as a person closely approaching advanced age. AR 89, 359; *see* 20 C.F.R. §§ 404.1563(d), 416.963(d). She attended school through the fifth or sixth grade and attended special education classes. AR 54, 264, 360. She can communicate verbally in English but her ability to read or write is limited. AR 67, 74, 262, 500. She has past work as an agricultural produce sorter for a fruit company, as an industrial cleaner for a wine company, and as a caregiver for the Department of Social and Health Services. AR 79, 265, 284-88.

#### V. The ALJ's Findings

The ALJ determined that Plaintiff was not disabled as it is defined in the Act at any time from February 13, 2015 (the amended alleged onset date) through March 19, 2018 (the date the ALJ issued his decision). AR 16, 28.

**At step one**, the ALJ found that Plaintiff had not engaged in substantial gainful activity since the amended alleged onset date. AR 17.

**At step two**, the ALJ found Plaintiff had the following severe impairments: degenerative disc disease, obesity, depressive disorder, anxiety disorder, personality disorder, and intellectual disorder. AR 17.

1       **At step three**, the ALJ found that Plaintiff did not have an impairment or  
2 combination of impairments that met or medically equaled the severity of one of the  
3 listed impairments in 20 C.F.R. § 404, Subpt. P, Appendix 1. AR 17-18.

4       **At step four**, the ALJ found that Plaintiff had the residual functional capacity  
5 to perform light work as defined in 20 C.F.R. §§ 404.1567(b), 416.967(b), albeit  
6 with some additional limitations. AR 20. With respect to her physical abilities, the  
7 ALJ found that Plaintiff could lift and carry 20 pounds occasionally and 10 pounds  
8 frequently. AR 20. She could stand and walk for six hours in an eight-hour workday  
9 and also sit for six hours in an eight-hour workday. AR 20. She could push and pull  
10 without limitation. AR 20. She could frequently stoop and occasionally kneel,  
11 crouch, crawl, and climb ramps and stairs, but could never climb ladders, ropes, or  
12 scaffolds. AR 20. She could not be exposed to extreme cold, vibration, hazardous  
13 machinery, or unprotected heights. AR 20.

14       With respect to Plaintiff's mental abilities, the ALJ found that Plaintiff could  
15 understand, remember, and carry out simple instructions. AR 20. She could make  
16 judgments commensurate with the functions of unskilled work—*i.e.*, “work that  
17 needs little or no judgment to do simple duties, work where a person can usually  
18 learn to do the job in 30 days, and work where little specific vocational preparation  
19 and judgment are needed.” AR 20. She could respond appropriately to supervision  
20 and deal with occasional changes in work environments. AR 20. However, she could

1 not work in close coordination with coworkers doing tasks requiring teamwork, nor  
2 could she have contact with the general public. AR 20.

3         Given these physical and mental limitations, the ALJ concluded that Plaintiff  
4 could do her past job as an agricultural produce sorter as the job was generally  
5 performed. AR 27-28. Based on the vocational expert's testimony, the ALJ found  
6 that this job did not require any activities that were precluded by Plaintiff's residual  
7 functional capacity. AR 27.

## 8                                   **VI. Issues for Review**

9         Plaintiff argues that the ALJ: (1) erred by not including fibromyalgia as one of  
10 her severe impairments at step two of the sequential evaluation, (2) improperly  
11 weighed the medical opinion evidence, (3) erred in not approving her claim in  
12 accordance with Medical-Vocational Guideline Rule 202.09, (4) improperly  
13 discredited her subjective pain complaint testimony, and (5) erred in finding that she  
14 could perform her past work as an agricultural sorter. ECF No. 13 at 4-17.

## 15                                   **VII. Discussion**

### 16         **A. The ALJ Erred at Step Two by Not Including Fibromyalgia as One of** 17                 **Plaintiff's Severe Impairments**

18         Plaintiff argues that all of her medical providers unanimously agreed that she  
19 suffers from fibromyalgia and that the ALJ therefore erred by not including this  
20 condition as one of her severe impairments at step two. ECF No. 13 at 4-11. The  
Commissioner appears to concede that this was error but argues that the error was



1 harmless because Plaintiff does not identify any limitations from this condition that  
2 were not already included in the residual functional capacity. ECF No. 14 at 3-5.

3 At step two in the sequential evaluation process, the ALJ must determine  
4 whether a claimant has a medically severe impairment or combination of  
5 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). The claimant has  
6 the burden to establish that he or she (1) has a medically determinable impairment  
7 and (2) that the impairment is severe. 20 C.F.R. §§ 404.1512, 416.912(a). To be  
8 severe, an impairment must significantly limit the claimant's ability to perform basic  
9 work activities. 20 C.F.R. §§ 404.1520(c), 404.1522(a), 416.920(c), 416.922(a).

10 Moreover, to establish the existence of a severe impairment, the claimant must  
11 provide objective medical evidence—a claimant's statements regarding his or her  
12 symptoms are insufficient, as are a claimant's reports of a diagnosis. 20 C.F.R. §§  
13 404.1521, 416.921. When a claimant produces objective medical evidence, however,  
14 “an ALJ may find that a claimant lacks a medically severe impairment or  
15 combination of impairments only when his conclusion is ‘clearly established by  
16 medical evidence.’” *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005) (quoting  
17 SSR 85-28).

18 When arguing on appeal that the ALJ failed to include a severe impairment at  
19 step two, a claimant cannot simply point “to a host of diagnoses scattered throughout  
20 the medical record.” *Cindy F. v. Berryhill*, 367 F. Supp. 3d 1195, 1207 (D. Or.

1 2019). Rather, to establish harmful error, a claimant must specifically identify  
2 functional limitations that the ALJ failed to consider in the sequential analysis. *Id.*;  
3 *see also Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007).

4 In this case, multiple treating and examining physicians opined that Plaintiff  
5 has fibromyalgia. In October 2015, Plaintiff's longtime primary care physician,  
6 Katheryn Norris, D.O., referred Plaintiff to internist Flint Orr, M.D., because she  
7 suspected possible rheumatoid arthritis. AR 1399. Dr. Orr examined Plaintiff and  
8 determined that his physical examination did not support a diagnosis of  
9 inflammatory arthritis. AR 1400. Instead, he believed that fibromyalgia was the most  
10 likely diagnosis. AR 1400-01. He recommended a variety of additional laboratory  
11 tests and imaging studies. AR 1401.

12 Plaintiff completed the additional testing. AR 1403. Upon reviewing it, Dr.  
13 Norris agreed with Dr. Orr that Plaintiff had fibromyalgia and added the condition to  
14 Plaintiff's treatment plan. AR 1411-12; *see also* AR 1414, 1419, 1421, 1425-26,  
15 1433, 1438, 1441. Dr. Norris opined that Plaintiff's fibromyalgia prevented her from  
16 performing any type of work on a reasonably continuous, sustained basis. AR 1688.

17 In June 2016, Dr. Norris referred Plaintiff to rheumatologist James Byrd,  
18 M.D., Ph.D. AR 1578. Dr. Byrd examined Plaintiff and documented greater than 11  
19 tender points. AR 1580; *see also* AR 1591, 1598, 1602, 1610, 1614. He also  
20 documented "diffuse allover body pain" in Plaintiff's muscles, joints, and skin. AR

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT AND REMANDING TO THE COMMISSIONER**

1 1579. He opined that her presentation was “most consistent with fibromyalgia,” but  
2 noted that this was “a diagnosis of exclusion” and wanted additional laboratory work  
3 done. AR 1580. He later diagnosed fibromyalgia. AR 1592, 1599.

4 In October 2016, Dr. Byrd stated that Plaintiff could not work with her  
5 condition. AR 1599. In July 2017, he again opined, “In review of her severe  
6 fibromyalgia symptoms, it is my professional opinion that I do not think she can  
7 work in any capacity.” AR 1615. He again reiterated this opinion in a separate  
8 medical questionnaire. AR 1575.

9 Dr. Norris later referred Plaintiff to psychiatrist Pedro Fernandez, M.D., who  
10 diagnosed major depressive disorder, chronic insomnia, and fibromyalgia. AR 1667.  
11 Dr. Fernandez noted that the prognosis for Plaintiff’s fibromyalgia was poorer  
12 because it coexisted with depression and anxiety. AR 1667. He opined that her  
13 fibromyalgia “worsen[ed] exponentially her capacity to work because this condition  
14 has a very strong emotional component and also her emotional condition worsens  
15 this somatic illness.” AR 1687.

16 To summarize, four separate physicians diagnosed Plaintiff with fibromyalgia  
17 and at least two believed that this condition precluded her from working altogether.  
18 As noted above, an ALJ’s conclusion that a claimant lacks a severe impairment must  
19 be “clearly established by medical evidence.” *Webb*, 433 F.3d at 687. And here there  
20 is *no* medical evidence supporting the ALJ’s conclusion—no medical provider

**ORDER GRANTING PLAINTIFF’S MOTION FOR SUMMARY  
JUDGMENT AND REMANDING TO THE COMMISSIONER**

1 opined that Plaintiff does not have fibromyalgia and, in fact, the medical evidence is  
2 unanimous that she does.

3 The Commissioner does not dispute that the ALJ erred by not including  
4 fibromyalgia as a medically determinable impairment at step two. *See* ECF No. 14 at  
5 3-5. However, the Commissioner argues that any error was harmless because “the  
6 ALJ sufficiently accounted for any limitations caused by Plaintiff’s impairments in  
7 the residual functional capacity finding.” *Id.* at 3.

8 The Commissioner is incorrect. Both Dr. Norris and Dr. Byrd believed that  
9 Plaintiff could not work at all due to her fibromyalgia symptoms. AR 1575, 1688.  
10 These opinions are plainly at odds with the residual functional capacity finding, in  
11 which the ALJ determined that Plaintiff could perform light work. *See* AR 20.  
12 Assuming (without deciding) the truth of these opinions, the Court cannot  
13 “confidently conclude” that the error was harmless. *Marsh*, 792 F.3d at 1173; *see*  
14 *Oudinot-Robertson v. Berryhill*, 2017 WL 4182807, at \*1 (D. Or. 2017) (Aiken, J.)  
15 (ALJ’s error at step two in not including fibromyalgia as a medically determinable  
16 impairment was not harmless because the ALJ excluded fibromyalgia symptoms  
17 from consideration at steps four and five). On remand, the ALJ shall include  
18 fibromyalgia as a severe impairment at step two and then consider the limiting  
19 effects arising from this condition in determining Plaintiff’s residual functional  
20 capacity.

**ORDER GRANTING PLAINTIFF’S MOTION FOR SUMMARY  
JUDGMENT AND REMANDING TO THE COMMISSIONER**

**B. The ALJ's Consideration of the Medical Opinion Evidence**

Plaintiff argues that the ALJ erred in evaluating and weighing the medical opinion evidence. ECF No. 13 at 4-11. Specifically, she argues the ALJ erred in weighing the medical opinions from four providers: (1) Dr. Byrd, (2) Dr. Norris, (3) Dr. Fernandez, and (4) examining psychologist Cecilia Cooper, Ph.D. *Id.*

**1. Dr. Byrd and Dr. Norris**

The ALJ gave no weight to the medical opinions of Dr. Byrd and Dr. Norris, who both opined that Plaintiff could not work at all. AR 26; *see* AR 1575, 1615, 1688. The ALJ's primary reasoning was that they both based their determinations on Plaintiff's diagnosis of fibromyalgia, which the ALJ did not believe was a medically determinable impairment. However, as discussed, the uncontroverted medical evidence establishes that Plaintiff has this condition. The ALJ also stated that "Dr. Byrd himself indicated that [Plaintiff] had less than 11 positive tender points, and he did not document pain in all 4 quadrants of her body." AR 26. This is plainly incorrect. AR 1579-80, 1591, 1598, 1602, 1610, 1614 (documenting greater than 11 tender points and "diffuse allover body pain"). Therefore, this was an improper basis upon which to discount their opinions.

However, the Commissioner argues that the ALJ offered another reason for discounting Dr. Byrd's and Dr. Norris's opinions: that they were conclusory and unexplained. ECF No. 14 at 10. Based on the current record, the Commissioner is

1 correct that this was a proper basis for discounting Dr. Byrd’s and Dr. Norris’s  
 2 opinions as they related to Plaintiff’s capacity for work—neither of them gave a  
 3 substantive explanation for their opinion. *See* 20 C.F.R. §§ 404.1527(c)(3),  
 4 416.927(c)(3) (“The better an explanation a source provides for a medical opinion,  
 5 the more weight we will give that medical opinion.”). On remand, however, Plaintiff  
 6 will have an opportunity to supplement the record. Additional medical evidence may  
 7 undermine this rationale as a basis for discounting Dr. Byrd’s and Dr. Norris’s  
 8 opinions.

## 9           **2.     Dr. Fernandez**

10           The ALJ mainly rejected Dr. Fernandez’s opinion on the grounds that he  
 11 based his determination on Plaintiff’s diagnosis of fibromyalgia, which the ALJ did  
 12 not believe was medically determinable. AR 26. As discussed, this was incorrect.<sup>2</sup>  
 13 However, the ALJ also reasoned that Dr. Fernandez did not explain “how exactly  
 14 [Plaintiff’s] fibromyalgia impacted her recovery from depression and anxiety.” AR  
 15 26. At least based on the current record—which Plaintiff will have the opportunity to  
 16 supplement on remand—this was proper. *See* 20 C.F.R. §§ 404.1527(c)(3),  
 17 416.927(c)(3).

## 18           **3.     Examining psychologist Cecilia Cooper, Ph.D.**

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20           <sup>2</sup> Moreover, the ALJ did not acknowledge or consider that Dr. Fernandez also diagnosed Plaintiff with major depressive disorder and insomnia. *See* AR 26.

1 At the conclusion of the hearing in this case, the ALJ determined that it was  
2 necessary to further develop the record with respect to Plaintiff's alleged illiteracy.  
3 AR 83-85. The ALJ referred Plaintiff to Dr. Cooper for a psychological consultative  
4 examination. AR 368.

5 Dr. Cooper evaluated Plaintiff on December 20, 2017. AR 1695-98. She  
6 apparently understood the ALJ's request to be "for non-English speaking IQ  
7 testing." AR 1695. She then administered a series of tests and concluded that  
8 Plaintiff's visual immediate memory skills and ability to carry out simple  
9 instructions with closely related steps were not significantly impaired, but that  
10 Plaintiff did have trouble remembering and completing complex instructions. AR  
11 1696. Dr. Cooper also administered the Wechsler Adult Intelligence Scale, which  
12 resulted in a full-scale IQ of 59. AR 1697. She concluded that Plaintiff's test scores  
13 were "indicative of significantly lower than average intellectual functioning." AR  
14 1698.

15 The ALJ outlined Dr. Cooper's findings, noting that Plaintiff did not have a  
16 significant visual memory impairment, that she could carry out simple instructions  
17 with closely related steps, but that she had trouble with complex instructions. AR 26.  
18 The ALJ also noted that Plaintiff's IQ score was 59 and that the remainder of her test  
19 scores, except for perceptual reasoning, were in "the extremely low range." AR 26.  
20 The ALJ then incorporated Dr. Cooper's finding that Plaintiff could only carry out

1 simple instructions into the residual functional capacity. AR 27; *see* AR 20. The ALJ  
2 then noted that “Dr. Cooper did not address other functional abilities.” AR 27.

3 Plaintiff argues the ALJ failed “to consider the evidence as a whole” because  
4 he omitted details about Plaintiff’s performance on the three-step command. ECF  
5 No. 13 at 10. However, the ALJ focused on and adopted Dr. Cooper’s bottom-line  
6 conclusion from this test: that Plaintiff could carry out simple instructions, but not  
7 complex ones. *See* AR 26-27, 1696.

8 Plaintiff also argues that the ALJ did not mention that she had test results in  
9 the bottom 4th percentile and that her IQ was 59. ECF No. 13 at 10. However, the  
10 ALJ did, in fact, outline these findings. *See* AR 26. Plaintiff implies that these  
11 findings should have resulted in a more restrictive residual functional capacity, but  
12 fails to identify any additional functional limitations that Dr. Cooper provided but  
13 the ALJ failed to include. *See* ECF No. 13 at 10-11; *Turner v. Comm’r of Soc. Sec.*,  
14 613 F.3d 1217, 1222-23 (9th Cir. 2010). Accordingly, Plaintiff fails to establish any  
15 error in the ALJ’s consideration of Dr. Cooper’s opinion.

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17 **C. Medical-Vocational Guidelines Rule 202.09**

18 Next, Plaintiff argues that the ALJ erred in not finding her disabled under  
19 Medical-Vocational Rule 202.09, which directs a decision of “disabled” when the  
20 claimant is limited to light work, is closely approaching advanced age (*i.e.*, between



1 the ages of 50 and 54), is illiterate or unable to communicate in English, and has  
2 work experience only in unskilled occupations. 20 C.F.R. § Pt. 404, Subpt. P, App.  
3 2, Rule 202.09.

4 However, the Medical-Vocational Guidelines only apply at step five of the  
5 sequential evaluation process—*i.e.*, when “the individual’s impairment(s) prevents  
6 the performance of his or her vocationally relevant past work” and the ALJ must  
7 then determine whether the claimant is able to perform other work in the national  
8 economy. 20 C.F.R. § Pt. 404, Subpt. P, App. 2, Rule 200.00(a). Here, the ALJ did  
9 not reach step five in the sequential evaluation because he determined that Plaintiff  
10 could return to her prior job as an agricultural sorter. *See* AR 27-28.

11 On remand, however, further consideration of Plaintiff’s fibromyalgia may  
12 affect the residual functional capacity assessment and, consequently, may have a  
13 bearing on whether Plaintiff was able to return to her past job as an agricultural  
14 sorter. If the ALJ ultimately determines that she could not, then the ALJ will need to  
15 proceed to step five and the Medical-Vocational Guidelines will be relevant.  
16 Resolution of this issue therefore depends on what the ALJ ultimately finds on  
17 remand at step four.

18 **D. On Remand, the ALJ Shall Reevaluate the Credibility of Plaintiff’s**  
19 **Subjective Pain Complaints**

20 Plaintiff argues the ALJ erred by discounting the credibility of her testimony  
regarding her pain symptoms. ECF No. 13 at 11-16. As discussed above, the ALJ

1 should have included fibromyalgia—a medical condition characterized by chronic  
 2 widespread pain—as a severe impairment. Because Plaintiff’s symptoms from this  
 3 condition may affect the analysis with respect to whether her pain complaints were  
 4 fully credible, upon remand the ALJ shall reevaluate Plaintiff’s credibility after  
 5 having considered her fibromyalgia.<sup>3</sup>

6 **E. The ALJ’s Finding That Plaintiff Could Perform Her Past Work as an**  
 7 **Agricultural Sorter**

8 Finally, Plaintiff argues that the ALJ erred in finding that she could perform  
 9 her past work as an agricultural sorter. ECF No. 13 at 16-17. Plaintiff’s argument  
 10 here just restates her prior arguments that the ALJ improperly rejected the medical  
 11 opinions of Dr. Byrd, Dr. Norris, Dr. Fernandez, and Dr. Cooper. *See Stubbs-*  
 12 *Danielson v. Astrue*, 539 F.3d 1169, 1175-76 (9th Cir. 2008); *Rollins*, 261 F.3d at  
 13 857. However, on remand, the ALJ will reconsider whether Plaintiff could perform  
 14 her past work as an agricultural sorter in light of her fibromyalgia and any additional  
 15 medical evidence that is obtained.

16 **F. Remedy**

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17 <sup>3</sup> The ALJ discounted Plaintiff’s credibility in part on the basis that she did “not appear to  
 18 allege an inability to work due to her mental impairments.” AR 23. This is incorrect. In her  
 19 application for benefits, Plaintiff alleged that she was disabled in part due to depression, anxiety,  
 and a learning disability. AR 263. In her prehearing brief, Plaintiff again alleged disability due to  
 the severity of her mental health impairments. AR 360.

20 It also appears the ALJ discounted Plaintiff’s testimony in part because she never disclosed  
 abuse by her domestic partner, or that she did not consistently disclose the full extent of the abuse  
 to all of her providers. *See* AR 22. This was not a legitimate basis for discounting her subjective  
 pain complaint testimony.

1 Plaintiff asks the Court to remand for benefits rather than for further  
2 proceedings. ECF No. 13 at 17-18. In rare circumstances, the Court may remand for  
3 benefits when three elements are met (*i.e.*, the “credit-as-true” rule): (1) the ALJ  
4 failed to provide legally sufficient reasons for rejecting the medical opinions; (2)  
5 further administrative proceedings would serve no useful purpose and there are no  
6 outstanding issues to resolve; and (3) if the improperly rejected medical opinions  
7 were credited as true, the ALJ would be required to find the claimant disabled on  
8 remand. *Benecke v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004) (remanding for  
9 benefits because multiple treating rheumatologists wrote detailed reports about how  
10 the claimant’s fibromyalgia prohibited her from working); *see also Treichler v.*  
11 *Comm’r of Soc. Sec.*, 775 F.3d 1090, 1099-1102 (9th Cir. 2014). In this case, the  
12 first element is not satisfied—the ALJ gave legally sufficient reasons for rejecting  
13 the medical opinions, at least given the record currently available.

14 Upon remand, the ALJ shall: (1) include fibromyalgia as a severe impairment  
15 at step two, (2) further develop the record and reweigh the medical opinions if new  
16 evidence becomes available, (3) reevaluate Plaintiff’s credibility, (4) offer Plaintiff  
17 the opportunity for a new hearing, and (5) recalculate the residual functional  
18 capacity considering all impairments (including fibromyalgia) and then evaluate  
19 Plaintiff’s ability to perform past relevant work and, if need be, her ability to  
20 perform other work available in the national economy. If necessary, the ALJ shall

**ORDER GRANTING PLAINTIFF’S MOTION FOR SUMMARY  
JUDGMENT AND REMANDING TO THE COMMISSIONER**

1 obtain supplemental evidence from a vocational expert. The ALJ shall then issue a  
2 new decision.

3 **VIII. Order**

4 Having reviewed the record, the ALJ's findings, and the parties' briefing, the  
5 Court finds the ALJ's decision is not supported by substantial evidence and contains  
6 legal error. Accordingly, **IT IS ORDERED:**

7 1. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **GRANTED**.

8 2. Defendant's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

9 3. The Commissioner's decision to deny Plaintiff's application for Social  
10 Security benefits is **REVERSED** and **REMANDED** to the Commissioner for  
11 further proceedings consistent with this Order, pursuant to sentence four of 42  
12 U.S.C. § 405(g).

13 4. Judgment shall be entered in favor of Plaintiff and against Defendant and the  
14 file shall be **closed**.

15 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
16 Order, forward copies to counsel, and close the file.

17 **DATED** this May 29, 2020.

18 *s/Robert H. Whaley*  
19 ROBERT H. WHALEY  
20 Senior United States District Judge

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY  
JUDGMENT AND REMANDING TO THE COMMISSIONER**